Cosmos Infratech Sdn Bhd v Midflex Advisory Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-40–01 OF 2016
ROZANA ALI JC
27 FEBRUARY 2017

Civil Procedure — Transfer of proceedings — From one High Court to another — Applicant applied for transfer of main suit to another High Court — Whether both suits involved common questions of law and fact — Rules of Court 2012 O 57

On 19 August 2014, the plaintiff filed an action in the High Court of Malaya in Shah Alam against the first defendant for a claim of RM2,202,889.32 ('Shah Alam suit'). The second and third defendants were directors of the first defendant and named as parties in this case as they had given a guarantee and indemnity to the plaintiff. The defendants then filed their defence and the first defendant filed its counterclaim for RM582,317.62 and general damages for breach of contract by the plaintiff caused by its supply of faulty machineries and willful suspension of works on the construction site. Concurrently, the first defendant also commenced another suit in the High Court of Malaya of Kuala Lumpur against a third party who then filed a counterclaim against the first defendant for the delay in construction work caused by the breakdown in machineries and suspension of manpower by the plaintiff ('Kuala Lumpur suit'). On 1 September 2016, the plaintiff obtained summary judgment against the defendants for the sum of RM1,620,571.70 with the balance sum of RM582,317.62 which constituted the first defendant's counterclaim to proceed for full trial on 9 November 2016. On 4 November 2016, the defendants obtained a stay of proceedings from the Court of Appeal on the judgment dated 1 September 2016. The defendant then filed this notice of application ('encl 38') for an order to transfer and consolidate the Shah Alam suit to be tried together with the Kuala Lumpur suit. The plaintiff objected to the defendant's application.

Held, allowing encl 38 with costs:

(1) From the facts, the breakdown of machinery and suspension of works were the main issues of the counterclaim by the first defendant in the Shah Alam suit and the third party's counterclaim in the Kuala Lumpur suit which involve common questions of law and facts which would be a need to call the same witnesses. Thus, the main consideration for this application was to save time and costs so that both civil proceedings could be dealt with conveniently and expeditiously (see para 12).

(2) The relief sought in both suits were premised on the same set of facts. Based on the alleged delay to the construction project, the third party in the Kuala Lumpur suit counterclaimed against the first defendant for liquidated ascertained damages for the sum of RM618,000. Similarly, the relief sought by the first defendant in Shah Alam suit was for general damages and indemnity against potential claims from the third party due to delay in works. The close nexus between the reliefs sought by parties in both suits warrant these two proceedings to be consolidated and heard together (see paras 13–14).

(3) The court was also of the view that these questions of fact and law arose out of the same project and should be consolidated and determined in the Kuala Lumpur suit so that it would be justly, sensibly and sufficiently ascertained. This would avoid inconsistent findings which could be given if similar issues have overlapping facts involving the same or different parties were litigated in two different courts in two different jurisdictions (see para 15).

(4) The Shah Alam suit could be fairly and more conveniently tried together in the Kuala Lumpur suit since the alleged machinery breakdown and suspension of works took place in the construction project situated in Kuala Lumpur. Further, the cause of action in both suits arose in Kuala Lumpur and it would be proper for the case to be heard and disposed of in the High Court. In addition, the time and costs at trial would be saved and benefitted all parties (see para 16).

[Bahasa Malaysia summary

Pada 19 Ogos 2014, plaintif memfailkan tindakan di Mahkamah Tinggi Malaya di Shah Alam terhadap defendan pertama untuk tuntutan RM2,202,889.32 ('saman Shah Alam'). Defendan kedua dan ketiga adalah pengarah defendan pertama dan dinamakan sebagai pihak dalam kes ini kerana mereka telah memberikan jaminan dan indemniti kepada plaintif. Defendan-defendan kemudian memfailkan pembelaan mereka dan defendan pertama memfailkan tuntutan balasnya untuk RM582,317.62 dan ganti rugi am kerana melanggar kontrak oleh plaintif yang disebabkan oleh pembekalan mesin rosak dan penggantungan sengaja kerja di tapak pembinaan. Pada masa yang sama, defendan pertama juga memulakan satu lagi tuntutan di Mahkamah Tinggi Malaya di Kuala Lumpur terhadap pihak ketiga yang kemudian memfailkan tuntutan balas terhadap defendan pertama bagi kelewatan dalam kerja pembinaan yang disebabkan oleh kerosakan mesin dan penggantungan tenaga kerja oleh plaintif ('saman Kuala Lumpur'). Pada 1 September 2016, plaintif memperoleh penghakiman terus terhadap defendan untuk jumlah sebanyak RM1,620,571.70 dengan jumlah baki sebanyak RM582,317.62 yang merupakan tuntutan balas defendan pertama untuk meneruskan perbicaraan penuh pada 9 November 2016. Pada 4 November 2016, defendan-defendan memperolehi kebenaran untuk

menggantung prosiding daripada mahkamah rayuan pada penghakiman bertarikh 1 September 2016. Defendan-defendan kemudian memfailkan notis permohonan ini ('lampiran 38') untuk suatu perintah untuk memindahkan dan menyatukan saman Shah Alam untuk didengar bersama dengan saman Kuala Lumpur. Plaintif membantah permohonan defendan.

Diputuskan, lampiran 38 dibenarkan dengan kos:

(1) Berdasarkan fakta, kerosakan jentera dan penggantungan kerja adalah isu utama tuntutan balas oleh defendan pertama dalam saman Shah Alam dan tuntutan balas pihak ketiga dalam saman Kuala Lumpur yang melibatkan persoalan umum tentang undang-undang dan fakta yang akan menjadi keperluan untuk memanggil saksi yang sama. Oleh itu, pertimbangan utama untuk permohonan ini adalah untuk menjimatkan masa dan kos supaya kedua-dua prosiding sivil dapat ditangani dengan mudah dan dengan cepat (lihat perenggan 12).

(2) Relif yang dipohon dalam kedua-dua guaman adalah berdasarkan fakta yang sama. Berdasarkan dakwaan kelewatan kepada projek pembinaan, pihak ketiga dalam saman Kuala Lumpur itu menuntut balas terhadap defendan pertama untuk ganti rugi yang ditentukan untuk jumlah wang sebanyak RM618,000. Begitu juga, relif yang diminta oleh defendan pertama dalam saman Shah Alam adalah ganti rugi am dan indemniti terhadap tuntutan yang berpotensi dari pihak ketiga disebabkan kelewatan dalam kerja. Hubungan dekat antara relif yang dipohon oleh pihak dalam kedua-dua guaman kedua-dua prosiding tersebut untuk disatukan dan didengar bersama adalah wajar (lihat perenggan 13–14).

(3) Mahkamah juga berpendapat bahawa persoalan fakta dan undang-undang ini timbul daripada projek yang sama dan perlu disatukan dan ditentukan dalam saman Kuala Lumpur supaya ia boleh ditentukan secara adil, saksama dan mencukupi. Ini akan mengelakkan penemuan yang tidak konsisten yang boleh diberi jika isu-isu yang sama mempunyai pertindihan fakta yang membabitkan pihak yang sama atau yang berbeza telah dilucutkan dalam dua mahkamah yang berbeza dalam dua bidang kuasa yang berbeza (lihat perenggan 15).

(4) Saman Shah Alam boleh menjadi adil dan mudah dicuba bersama dalam saman Kuala Lumpur kerana kerosakan jentera yang dikatakan dan penggantungan kerja berlaku dalam projek pembinaan yang terletak di Kuala Lumpur. Tambahan pula, punca tindakan kedua-dua saman itu timbul di Kuala Lumpur dan adalah wajar untuk kes itu didengar dan dilupuskan di Mahkamah Tinggi. Di samping itu, masa dan kos yang dibicarakan akan disimpan dan mendapat manfaat daripada semua pihak (lihat perenggan 16).]

Notes

For a case on from one High Court to another, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 10852.

Cases referred to

Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244, FC (refd)

Legislation referred to

Rules of Court 2012 O 57, O 57 r 1(1), (4)

Tony Dhana (Tony Dhana & Co) for the plaintiff.
Karthini Mahendranathan (Skrine) for the defendant.

Rozana Ali JC:

INTRODUCTION

[1] This is a notice of application (encl 38) by the defendants for an order to transfer and consolidate the current suit ('SA Suit') and to be tried together with Civil Suit No WA-22C-47–08 of 2016 at the Kuala Lumpur High Court ('KL Suit').

GROUNDS OF APPLICATION

[2] The affidavit in support (encl 40) outline the grounds as follows:

(a) there are common questions of fact and law in the SA Suit and the KL Suit which warrant both actions to be consolidated or tried together to save time and costs;

(b) the parties involved in the SA Suit and the KL Suit are principal players in the same construction project; wherein they are the developer, main contractor, and subcontractor of the same transactions or same series of transactions;

(c) the relief sought by the first defendant the main contractor in the SA Suit overlaps with the relief sought by, the developer, Alamrio Properties Sdn Bhd ('Alamrio') via its counterclaim in the KL Suit. Both counterclaims involved the determination of whether the suspension of work by the plaintiff caused any delay to the construction project and whether there was any justification as to the delay of works;

(d) the common questions of fact and law arising out of the same construction project should not be determined by two different courts

in order to avoid the undesirable situation where there are two conflicting or inconsistent judicial findings on common questions of fact or law; and

(e) the SA Suit may be more conveniently and fairly tried if transferred to the High Court at Kuala Lumpur because:

(i) the cause of action arose from the construction project which was situated in Sentul, Kuala Lumpur;

(ii) the facts on which the SA Suit and the KL Suit are based exist or are alleged to have occurred during the construction project which was situated in Sentul, Kuala Lumpur;

(iii) the stand-alone value of the first defendant's counterclaim amounts to only RM582,317.62 and it falls within the jurisdiction of the sessions court. In view of that, the first defendant's counterclaim could be more conveniently and properly tried in the KL Suit where the value of the main claim there exceeds RM1m and both the SA Suit and the KL Suit involve common questions of fact and law;

(iv) saving of time and costs at the consolidated trial; and

(v) the transfer of proceedings to Kuala Lumpur High Court and consolidation with the KL Suit will not cause any further delay because the Court of Appeal had ordered that the SA Suit be stayed pending the defendants' appeal.

BACKGROUND FACTS

[3] The plaintiff's claim is for the sum of RM2,202,889.32 being rental of machinery and manpower to the first defendant for bored piling works pursuant to a contract dated 19 August 2014. In order to ensure payment for the said rental and manpower, the second and third defendants, who were directors of the first defendant company, gave a guarantee and indemnity dated 12 December 2014 to the plaintiff.

[4] The defendants filed their defence and the first defendant filed its counterclaim for RM582,317.62, and general damages for breach of contract by the plaintiff caused by its supply of faulty machineries, and wilful suspension of works on the construction site.

[5] Concurrently, the first defendant commenced the KL Suit on 12 August 2016 against the Alamrio who then in turn filed a counterclaim against the first defendant for the delay in construction work caused by the breakdown in machineries and suspension of manpower by the plaintiff.

[6] On 1 September 2016, the plaintiff obtain a summary judgment in the SA Suit against the defendants for the sum of RM1,620,571.70 with the balance sum of RM582,317.62 which constituted the first defendant counterclaim to proceed for full trial scheduled on 9 November 2016. On 4 November 2016, the defendants obtained a stay of proceedings from the Court of Appeal on the judgment date 1 September 2016.

THE PLAINTIFF'S OBJECTIONS

[7] The plaintiff objected to the transfer on the followings basis:

(a) this court is unable to evaluate relevancy of the transfer since the defendant did not produce the statement of claim of KL Suit court;

(b) from the statement of defence by Alamrio in the KL Suit, it reveals that the second and third defendants were not involved and there was no claim made against them for the delay caused by the breakdown of machinery. Furthermore in relation to the breakdown of machinery, the first defendant was compensated with debit notes;

(c) this application is an abuse of the process of the court and cause delay of this litigation since the summary judgment had already been granted to the plaintiff;

(d) it is unreasonable to transfer and consolidate the suit since the plaintiff has no connection with the contract between the first defendant and the Alamrio; and

(e) there are no similar question facts, law and transactions between the KL Suit and SA Suit. The plaintiff's claim against the defendants is for rental of machinery and manpower and has not relation with the claim by the first defendant and Alamrio. If the counterclaim is transferred to High Court Kuala Lumpur, it will cause delay in the settlement of the plaintiff's claim.

[8] Based on the reasons above, the plaintiff requested that the defendant's application is dismissed.

FINDINGS

[9] The procedure on transfer of proceedings to another Court is governed by O 57 of the Rules of Court 2012. Order 57 r 1(1) of the Rules of Court 2012 reads as follows:

> (1) where the Judge of the High Court ... is satisfied that any proceedings in that Court can be more conveniently or fairly tried in some other Court of co-ordinate jurisdiction, he may on application by any party, order the proceedings to be transferred to the other Court.

[10] Further, O 57 r 1(4) of the Rules of Court 2012 also set out the factors to be considered by the Court. In *Central Securities (Holdings) Bhd v Haron Bin Mohamed Zaid* [1979] 2 MLJ 244, the Federal Court held that consolidation of the two actions should be allowed because the parties were the same, the actions arose out of the same transactions and the questions of law and fact were common to them. The Federal Court aptly said at p 251:

> the main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject-matter of the actions 'to render it desirable that the whole should be disposed of at the same time' ...

[11] Based on the pleadings of KL Suit and submissions by both parties, it would appear that there are common questions of law and fact in the counterclaim of the SA Suit which would involves the main issue that are:

(a) was there a delay in the construction project. If there was a delay, then the question is whether it was caused by the breakdown of machinery that was supplied by the subcontractor who is the plaintiff. The plaintiff had rented the machinery and manpower to the first defendant. Therefore in the finality, who should be liable and indemnify for the delay caused to the construction project; and

(b) whether there was a wilful or reasonable suspension of work any of the parties.

[12] From the facts, the breakdown of machinery and suspension of works are the main issues of the counterclaim by the first defendant in the SA Suit and the Alamrio's counterclaim in the KL Suit which in my opinion involve common questions of law and facts which would be a need to call the same witnesses. Thus, the main consideration for this application is to save time and costs so that both civil proceedings can be dealt with conveniently and expeditiously.

[13] Having perused the pleadings of the KL Suit, I am of the view that the relief sought in both suits were premised on the same set of facts. This is clearly illustrated in para 62 of the Alamrio's counterclaim where the paragraph reads:

> Further to the above, the Defendant states that at the time the Plaintiff [*1st Defendant in SA Suit*] abandon the project site, the Plaintiff was already behind schedule in terms of the construction. As such the Defendant [*Alamrio in KL Suit*] is entitled to claim for liquidated damages on the delay of works caused by the Plaintiff. (Emphasis added.)

[14] Based on the alleged delay to the construction project, Alamrio claimed against the first defendant for liquidated ascertained damages due to delay in

works in the sum of RM618,000. Similarly, the relief sought by the first defendant in SA Suit is for general damages and indemnity against potential claims from the Alamrio due to delay in works. The close nexus between the reliefs sought by parties in both suits, in my view warrant these two proceedings to be consolidated and heard together.

[15] I am also of the view in such circumstances, those questions of fact and law arisen out of the same project should be consolidated and determined in the KL Suit so that it would be justly, sensibly and more sufficiently ascertained. This prudently would avoid inconsistent findings which could be given if similar issues have overlapping facts involving the same or different parties were litigated in two different courts in two different jurisdictions.

[16] Therefore I find that this SA Suit can be fairly and more conveniently tried together in KL Suit since the alleged machinery breakdown and suspension of works took place in the construction project situated in Kuala Lumpur. Furthermore, the cause of action in both suits arose in Kuala Lumpur and it would be proper for the case to be heard and disposed of in the High Court. In addition, the time and costs at trial will be saved and benefitted all parties.

[17] Based on the reason above, the defendant's notice of application at encl 38 is allowed with costs.

Enclosure 38 allowed with costs.

Reported by Lee TJ